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November 14, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: MM Docket No. 93-228
RM-8295
Petition for Reconsideration

Dear Mr. Caton:

On behalf of Ives Broadcasting, Inc., licensee of WHST(FM), Tawas City, Michigan, we hereby submit an original and eleven (11) copies of its Opposition to the Petition for Reconsideration filed by Patricia Mason on October 7, 1994, concerning the Commission's Report and Order (Docket No. 93-228), DA 94-955 (released September 7, 1994). This Opposition is respectfully directed to the attention of the Acting Chief, Allocations Branch.

Please direct any questions or correspondence concerning this matter to our offices.

Sincerely yours,

Louise Cybulski
Louise Cybulski
Counsel for
Ives Broadcasting, Inc.

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of)

Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Tawas City, Michigan))

MM Docket No. 93-228
RM-8295

TO: Acting Chief, Allocations Branch

OPPOSITION TO PETITION FOR RECONSIDERATION

Ives Broadcasting, Inc. ("Ives"), by counsel and pursuant to Section 1.429(f) of the Commission's Rules, hereby respectfully opposes the Petition for Reconsideration ("Petition") filed by Patricia Mason ("Mason") concerning the Commission's Report and Order, DA 94-955 (released September 7, 1994) ("Report and Order") in the above-captioned proceeding. The Public Notice of the filing of the Petition was published in the Federal Register, Vol. 59, No. 207, p. 53977, on October 27, 1994, requiring oppositions to be filed by November 14, 1994. Accordingly, this Opposition is timely filed. As demonstrated herein, Mason's Petition is without merit. In support hereof, the following is respectfully shown:

I. INTRODUCTION

1. As a preliminary matter, Ives wishes to reveal to the Commission the connection between Mason and the two radio stations competing against Ives in Tawas City. Patricia Mason is the sister of John Carroll, the President and General Manager of Carroll Enterprises, Inc., the licensee of WIOS(AM) and WKJC(FM) in Tawas City. See the attached Declaration of Lori Wojahn, the Office Manager at WHST. It easily can be

surmised that Mason's Petition, perhaps even her participation in the entire rule making proceeding, was prompted by Carroll Enterprises' tactics to prevent a competitor in the marketplace from achieving a modification which will allow it to provide improved service to the public.^{1/}

2. WHST currently operates on Channel 297A. The Commission issued its Notice of Proposed Rule Making, 8 FCC Rcd 5217 (1993) in response to Ives' petition requesting a substitution of Channel 291A for Channel 297A. Mason participated in the rule making proceeding by indicating her intent to file an application for Channel 291A at Tawas City. The Commission's Report and Order amended the Table of Allotments, Section 73.202(b) of the Commission's Rules, pursuant to Ives' request to add Channel 291A at Tawas City, and modified the license of WHST to specify operations on Channel 291A. Through its Report and Order, the Commission also allotted Channel 277A to Tawas City for which interested parties may file applications.

II. MASON HAS PRESENTED NO VALID BASIS FOR SEEKING RECONSIDERATION OF THE COMMISSION'S REPORT AND ORDER

3. In her Petition for Reconsideration of the Report and Order, Mason raises some of the same arguments she raised in her comments and reply comments in the rule making proceeding, which were considered and correctly resolved by the Commission's staff in the Report and Order. Mason also relies on certain facts which she now presents to the Commission for the first time. In particular, Mason attached to her Petition a

^{1/} Mason's -- or her attorney's -- attempted profundity at n.2 of her Petition backfires. It is Mason who is deceptive in not revealing her true intentions or the intentions of whomever is behind her. People who live in glass houses should not throw stones, or perhaps, at a minimum, Mason should examine her own web.

copy of a June 3, 1991 letter to the prior licensee^{2/} of WHST (then WDBI-FM) informing the licensee that it may increase the power of the facility up to six kilowatts by filing an FCC Form 302, pursuant to the Commission's Public Notice, Reference No. 451, released November 3, 1989 and the Second Report and Order (Docket 88-375), 4 FCC Rcd 6375 (1989). Mason states that Ives was fully aware of the Commission's June 3, 1991 letter, but that is not true. Petition at p.2. Neither Ives nor its counsel was aware of the correspondence between the prior licensee and the Commission with respect to six kilowatt operation.

4. Mason also attached to her Petition two letters to the Commission from counsel for Ives, dated August 16 and August 23, 1993, withdrawing its April 7, 1993 request for six kilowatt equivalent operation.^{3/} As both the August 16 and August 23, 1993 letters state, Ives was withdrawing the April 7, 1993 request for six kilowatt operation because it was pursuing another method of improving WHST's performance (i.e., the filing of its petition for rule making, resulting in the Commission's release of its Notice of Proposed Rule Making).

5. Mason's reliance on these facts is untimely and the Commission's consideration of these facts is prohibited under Section 1.429(b) of the Commission's Rules, which states as follows:

^{2/} Ives became the licensee of WDBI-FM, on March 1, 1993, following Commission consent to the assignment of license.

^{3/} The August 23 duplicate letter was filed because, due to an in-office error, counsel for Ives initially could not locate a date-stamped copy of the August 16 letter to verify its filing. The August 23 letter was filed as a precaution.

A petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances:

(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;

(2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or

(3) The Commission determines that consideration of the facts relied on is required in the public interest.

47 C.F.R. § 1.429(b). Mason has not met any of the above three criteria, in that the facts she presents in her Petition with respect to the attached documents (1) do not relate to events occurring since Mason's participation in the rule making proceeding, and (2) could have been learned through the exercise of ordinary diligence. Mason fails to make any showing that the Commission's consideration of the information is in the public interest. To the contrary, such consideration wastes Commission's resources because Mason's argument with respect to prior authority for six kilowatt operation on Channel 297A is irrelevant. If such authority at one time was requested by and granted to the previous licensee, as the Commission's June 3, 1991 letter indicates, Ives was unaware of it and its existence does nothing to further Mason's allegations of deceit.

6. In its Report and Order, the Commission fully considered and properly disposed of Mason's other arguments now reiterated in her Petition. One of Mason's arguments is that Ives could be fully spaced at six kilowatts on its present Channel 297A by relocating its antenna site 4.29 km. Petition at ¶ 2. Without citing any authority,

Mason states that "it is incumbent upon a potential applicant to demonstrate that no sites are available in an area that would provide adequate spacing." Id. However, Mason failed to demonstrate the availability of a new site for Channel 297A at six kilowatts which meets zoning and building requirements. Ives' proposal for Channel 291A provides a solution for using its present site which is in full compliance with all Commission rules and environmental requirements. The Commission acknowledged in ¶ 4 of its Report and Order these arguments made by Ives in its reply comments, and properly found the requested channel substitution to serve the public interest.

7. Mason also claims that the Commission did not define the term "equivalent channel" in its Report and Order. Petition at ¶ 3. However, the Commission stated at ¶ 6 of its Report and Order that it considers "channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards," citing Vero Beach, Florida, 3 FCC Rcd 1049 (1988), rev. denied, 4 FCC Rcd 2184, 2185 (1989). Moreover, in deciding the Vero Beach case, the Commission stated that "[i]n allotting an equivalent channel to Vero Beach to comply with Section 1.420(g)(2) of the Rules, we realize that no two channels are ever entirely identical." Vero Beach, 4 FCC Rcd at 2185 ¶ 8. The Vero Beach case invoked Section 1.420(g)(2) of the Commission's Rules because the requested substitution of channels by the initial petitioner for rule making involved a different class

of channel. That was not the case in this rule making, where Ives requested a substitution of same class channels.^{4/}

8. In Vero Beach, similar to Mason's argument here, the petitioner complained that the added channel was not an equivalent channel. In Vero Beach, the equivalent channel allotted, Channel 259C2, allegedly required a very limited area for which it could locate an antenna site, and the eventual licensee might not be able to operate it as a full Class C2 facility. The Commission upheld the staff's determination that the newly allotted channel indeed was equivalent, despite the petitioner's arguments to the contrary.

9. Mason's primary complaint is that she has been unfairly treated because the Commission allotted "only" a Class A facility to Tawas City for which she and other interested parties can file applications.^{5/} The Commission properly restricts its examination to the class of station at the time it is deciding a rule making proceeding. Were it otherwise, and were the Commission to examine all potential possibilities then or in the future, it would create administrative chaos. Administrative certainty requires a time at which the Commission can make comparisons between facilities. Were it to speculate as to all possible future modifications, there is no logical point at which to stop.

^{4/} Section 1.420(g)(2) of the Commission's Rules provides that a substitution of a different class of channel is permitted where the Commission allots an additional equivalent class of channel to accommodate other expressions of interest.

^{5/} Thanks to Mason's observations with respect to the apparent feasibility of operations at 25 kilowatts on Channel 291, Ives filed on November 8, 1994, an FCC Form 301 application for a one-step upgrade to Channel 291C3.

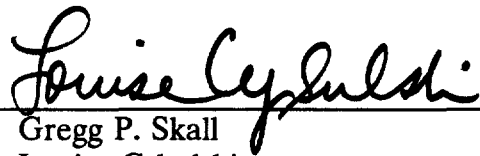
10. Mason should not be heard to complain. Mason had full opportunity, as did any other interested party, to investigate what channels were available for allotment to Tawas City and to submit a petition for rule making requesting that the Commission make an allotment most favorable to Mason.

CONCLUSION

In light of the foregoing, Ives Broadcasting, Inc. respectfully requests that the Commission deny Patricia Mason's Petition for Reconsideration and uphold the Commission's Report and Order.

Respectfully submitted,

IVES BROADCASTING, INC.

By: 
Gregg P. Skall
Louise Cybulski
Its Attorneys

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November 14, 1994

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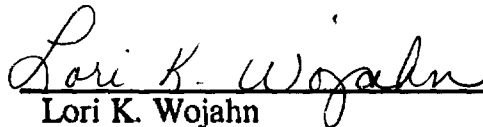
DECLARATION

I, Lori K. Wojahn, under penalty of perjury under the laws of the United States, hereby declare as follows:

1. I am the Office Manager of WHST(FM), Tawas City, Michigan. I have been employed at WHST in this capacity since June 6, 1994.

2. I have learned that Patricia Mason is the sister of John Carroll, the president and general manager Carroll Enterprises, Inc., the licensee of the competing stations in Tawas City, WIOS(AM) and WKJC(FM). I obtained this information from Peter Barnes, an employee at WKJC.

3. I hereby certify that all of the facts asserted in this Declaration are true and correct to the best of my knowledge and belief.


Lori K. Wojahn

November 10, 1994


CERTIFICATE OF SERVICE

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true and correct copy of the foregoing "Opposition to Petition for Reconsideration" was served by United States mail, first-class, postage prepaid, on the 14th day of November, 1994, on the following individuals:

- * John A. Karousos, Acting Chief
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Susan A. Burk

* -- VIA HAND DELIVERY